No. 87-2079

In the Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1987

FRANK B. and JOANN SHIRK,
Individually and Doing Business as
OREGON MEAT CUTTING SCHOOL,
Petitioner,

v.

WILLIAM E. BROCK,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. May a Court of Appeals in a claim for after hours overtime not having a complete record before it because the Appellant government did not bring up to the Court of Appeals as a part of the record on appeal the exhibits and video tape of the time it takes to perform certain tasks after closing the business involved, overrule a trial judge in the District Court on questions of intention, such as whether the petitioners for this writ performed or acted

a) in good faith

b) without willful violation of the law?

2. May a Circuit Court of Appeals overrule a District Court as a trier of fact where less than the full record before the District Court is brought up by the appellant government agency?

3. May a Circuit Court of Appeals overrule a District Court trier of fact notwithstanding the provisions of rule 52 (a) and the holding of Icicle Seafoods Inc. v. Worthington (475 US 709, 89 L Ed 2d 739, 106 S. Ct. 1527 (1986)) decided by this court that, on questions of intention, rule 52 (a) applies and the trier of fact shall not be overruled unless there is not substantial evidence to support the fact found. (Where the government appellant does not bring before the Court of Appeals all relevant evidence

received at trial, can one say there is no substantial evidence?).

4. May a Circuit Court of Appeals ignore the application of the rule and the application of Icicle Seafoods, supra, to the intention, that is to say ignore both the record and the law as announced by this court in deciding a case where Icicle has been cited by a party as its "main cause" in its case is applicable?

5. May a Circuit Court of Appeals nullify the Act of Congress requiring that a good faith defense be given effect and requiring that willfulness by proved for a double penalty to apply, including ignoring the provisions of the acts of Congress, without explaining, in its per curiam opinion, why these provisions of statute should be nullified in this case. (Indeed it is very close I effect to the Court of Appeals having decided that the act of Congress was unconstitutional and therefore would not be applied.)

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987
No.

FRANK B. and JOANNE SHIRK, Individually and Doing Business as OREGON MEAT CUTTING SCHOOL,

Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS TO THE NINTH CIRCUIT

To the Honorable William H. Rehnquist, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Frank B. and Joann Shirk, Individually and Doing Business as Oregon Meat Cutting School, the petitioners herein, pray that a writ

of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on the 8th day of December, 1987. The petition for rehearing was denied February 17, 1988.

Opinions Below

The Opinion of the Ninth Circuit Court of Appeals is reported at ____ F2d _____ (1988) and is printed in Appendix A, page A-1. The judgment of the District Court of the District of Oregon is printed in Appendix A, page A-4. The Journal Entry of Judgment of the United States District Court for the District of Oregon is printed in Appendix A, page A-47.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals (Appendix A, page) was entered on the 8th day of December, 1987. A timely petition for rehearing was denied February 17, 1988 and mandate was entered on February 24th, 1988 (Appendix A, page A-13). The jurisdiction of the Court is invoked under 28 US Code 1254.

Questions Presented

1. May a Court of Appeals in a claim for after hours overtime not having a complete record before it because the Appellant government did not bring up to the Court of Appeals as a part of the record on appeal the exhibits and videc tape of the time it takes to perform certain tasks after

closing the business involved, overrule a trial judge in the District Court on questions of intention, such as whether the petitioners for this writ performed or acted

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by this court that, on questions of intention, rule 52 (a) applies and the trier of fact shall not be overruled unless there is not substantial evidence to support the fact found. (Where the government appellant does not bring before the Court of Appeals all relevant evidence received at trial, can one say there is no substantial evidence?).

4. May a Circuit Court of Appeals ignore the application of the rule and the application of Icicle Seafoods, supra, to the intention, that is to say ignore both the record and the law as announced by this court in deciding a case where Icicle has been cited by a party as its "main case" in its brief on appeal and where that case is applicable?

5. May a Circuit Court of Appeals nullify the Act of Congress requiring that a good faith defense be given effect and requiring that willfulness by proved for a double penalty to apply, including ignoring the provisions of the acts of Congress, without explaining, in its per curiam opinion, why these provisions of statute should be nullified in this case. (Indeed it is very close in effect to the Court of Appeals having decided that the act of Congress was unconstitutional and therefore would not be applied).

Statutes Involved

The pertinent parts of the acts of Congress requiring that a decision be made whether parties

have acted in good faith or have been willful, in the premises, are as follows:

> 29 USC 255(a) provides the cause of action "... shall be forever barred unless commenced within two years... except... a cause... arising out of a willful violation may be commenced within three years..... 29 USC 260 provides "... if the employer shows... that the act of omission giving rise to such action was in good faith and that he had reasonable grounds for believing... was not a violation... the court may... award no liquidated damages.

These statutes are set forth in the Appendix at page in more detail.

Statement of Case

Petitioners operated a meat cutting school. They sold the meat which was already cut, wrapped and priced at the school as a product of the training exercises at retail at two separate locations. One was

at the location of the school at Cottage Grove, Oregon. The other was some 24 miles distant at Springfield, Oregon and consisted solely of a retail store staffed by two and one-half persons.

A long time (over a year) after the retail store at the remote location was closed the workers at that store filed a claim with the Secretary of Labor. The intitial claim was for vacation pay, or for pay for the children of those workers, but at trial the claim had been changed to an overtime claim.

The two workers used a time clock and time cards which they punched and which the workers at the remote location themselves totalled at the end of each week. The totals showed the number of hours

which each of them asserted were stated on the time clock punched entries on the weekly card.

Written instructions were issued at the time of hiring that no overtime would be permitted and the method of carrying out the work, so that it would be done within 40 hours per week, was stated in writing. A major portion of the subsequent controversy was over whether the tasks of work could be performed by the staff within that limitation (one-half hour before opening the store and one-half hour after closing). No defendant or manager, other than one of the two claimants, worked at the remote location. The time needed to do the tasks was tested at the trial level by preparation and receipt in evidence of a video tape of two

people performing the tasks which the claimants stated took two to four hours after 6 p.m. closing of the store. The video tape showed the performance of the tasks completed within about 12 minutes. The trial court finding of fact stated that the owners acted in good faith and were not willful in their violation of the records and hours provisions. The government, appealing this trial court finding of fact as to intention or state of mind failed to bring the video tape up as a part of the record on appeal. The Court of Appeals reversed on the questions of intention and did so in a way that neither mentioned rule 52 (a), nor Icicle Seafoods and its rule as announced by the court.

A claim by the workers,

in the transcript or deposition was that frequently, after 7:00 p.m., (The store closed at 6:00 p.m. and the work day ended one half hour later, at 6:30 p.m.) the employees at the remote location telephoned to the headquarters and talked to one of the defendants, Frank Shirk, or else he called them at 7:00 p.m. The long distance telephone charge slips were introduced in evidence but were not brought forward by the government as part of the record on appeal. They showed an absence of calls after 7:00 p.m. and very few calls over a three year period later than 6:30 p.m., either from the remote location to the headquarters or from the headquarters' telephone to the remote location. The long distance records established as a testimony that the

charge between headquarters and the Springfield store was a long distance charge and would be itemized on the bills received in evidence by the trier of fact.

During the trial the owners admitted that the punched weekly time cards occasionally showed more than 40 hours. These defendants were able to prove that occasional payments were made to these claimants for the overtime where the time card total of hours had been recomputed by others than the claimants. They also admitted that there were some weeks where the time card punch-in and punch-out data showed more than 40 hours during the applicable period, but where the payroll bookkeeper had not identified the error made by the two claimants in writing in their own hand at the

bottom of the time card showing the total of 40 hours and no recomputation or payment had been made. Owners offered to pay what the recomputed totals of the time card entries would show.

Owners offered in evidence a computer print-out summary of the differences between the 40 hours paid and the actual in and out time printed by the clock in Springfield on the time card, if computed and summed up properly. This exhibit was not brought forward by the government in its appeal. (This computer summary was not a part of Owners' records at any time. It was generated off of their premises for preparation for trial by a contractor to Owner's trial counsel.)

The Court of Appeals

was well aware of these deficiencies in the record in the sense that they knew from the brief, from the supplement to the record showing that exhibits were received in evidence but not brought forward by appellant as record on appeal, and from oral argument that they did not have the complete record.

The per curiam appellate opinion makes no reference to this fact whatever and endeavors to treat a question of intention as a matter of law and then subjectively decide that law question.

The petitioners herein did bring forward the exhibit docket sheet from the trial court showing the dockets of exibits offered and in fact received as a part of their Supplemental Abstract of Record, as

stated above. This showed the exhibits referred to in this statement of case, and other exhibits also such as checks paying for overtime during the period in controversy and making that payment to these claimants during that period.

The trier of fact also viewed the former Springfield store building interior during the trial and could judge how long it would take to sweep or mop the floor. Trier of fact saw the witnesses, their body language and demeanor, and heard their voices.

Reasons for Granting Writ

Injustice should be prevented by taking the matter up to the Supreme Court and applying the rules of procedure, allowing the trier of fact who saw the witnesses

to determine their credibility, giving effect to the words of Congress, and giving effect to the pronouncement of this court nationwide, even within the precincts of the Ninth Circuit.

Secondarily this court should grant the writ and remand to the Ninth Circuit so that the opinion of the circuit will be on the issues in the case and on the case actually presented rather than their subjective reaction to a partial and imperfect record about the bona fides of citizens whom they never saw.

The Court should require that the Ninth Circuit should explain why the words put in the statutes by Congress do not apply rather than simply stating that they do not. Otherwise, if not heard of remanded, this case may be cited as authority for

the appellate court to find malicious intent on the part of citizens whom the trier of fact said were without that intent and to penalize them based only on a partial, incomplete and dry record.

This is a remedial statute rather than a criminal one, but an analogy can be suggested. Suppose that the trier of fact has found no malicious intent in a criminal charge where presence of absence of intent determined the severity of an offense, but the appellate court has stated that such intent is there, and done so upon an incomplete record. By analogy in a criminal case a jury finding of a lesser included offense or of lack of guilt could be reversed on the factual question of intention by such a procedure as is being used

by the Appellate Court in this case.

Due process is not accorded where the opinion ignores

(a) the incompleteness of the record;

(b) the state of the law as announced by the United State Supreme Court; and

(c) the federal rules of procedure requiring that a fact finder not be overthrown where there is substantial evidence to support his or her finding.

Otherwise, Courts will write fiction, not reality, and impose judgments in effect upon their own biases rather than upon the facts and the law.

If relevant evidence were available and offered at trial, but were excluded by the judge and

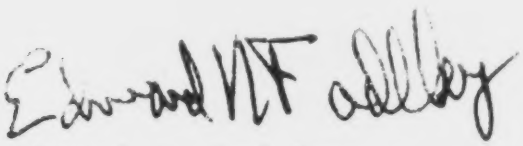
the finding made in the absence of that relevant evidence, due process in the form of a complete hearing would have been denied. The result here is the same. The Court of Appeals did not have before it the relevant evidence admitted and understood by the fact finder. Rather, the Court of Appeals heard one side of the question and denied any effect or meaning to what was heard on the other side by the trier of fact. Based on hearing only a part of the evidence at trial, the court entered its judgment. This is a lack of fundamental fairness and due process.

Conclusion

For the foregoing reasons, this petition for writ of certiorari

should be granted.

Respectfully submitted,



Edward N. Fadeley

Counsel for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM E. BROCK, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

JOANN SHIRK, individually and doing business as OREGON MEAT CUTTING SCHOOL; FRANK B. SHIRK, individually and doing business as OREGON MEAT CUTTING SCHOOL,

Defendants-Appellees.

No. 86-4121

D.C. No. CV-83-968-E

OPINION

Appeal from the United States District Court
for the District of Oregon
James M. Burns, District Judge, Presiding

Argued and Submitted
September 11, 1987—Portland, Oregon

Filed December 8, 1987

Before: Eugene A. Wright, J. Clifford Wallace and Harry Pregerson, Circuit Judges.

SUMMARY

Labor

Appeal from judgment. Reversed and remanded.

Appellees the Shirks were found guilty of violating the Fair Labor Standards Act (FLSA) by failing to pay an employee overtime. Subsequently, a time clock was installed although employees were told they were on salary. Rules emphasized that no overtime would be authorized. The district court found that appellees knew or had reason to know that their employees were covered by the FLSA and were in fact working more than 40 hours per week. It concluded that the Shirks violated the overtime and reporting provisions of the FLSA, but denied the appellant Secretary of Labor's request for back pay, for liquidated damages, and for injunctive relief.

[1] At issues is the trial court's finding that the Shirks' acts or omissions were not "willful." [2] On these facts, the Shirks "willfully" violated the FLSA. The three-year statute of limitation applies. [3] Employers who violate the overtime compensation provisions of the FLSA are liable to their employees both for unpaid overtime compensation and for liquidated damages. [4] However, the court may refuse to award liquidated damages if the employer demonstrates that it acted reasonably and in good faith. [5] Reviewing the district court's findings, the Shirks failed to demonstrate their good faith. [6] Even assuming that the Shirks subjectively believed, in good faith, that they were not required to compensate their employees for unauthorized overtime, they failed utterly to satisfy their burden of proving that this belief was reasonable. The facts in this case simply cannot support a finding that the Shirks had objectively reasonable grounds for believing no violation was taking place. [7] The district court denied injunctive relief on its finding that the defendants honestly believed they were not violating the FLSA. [8] Likelihood of future compliance is an important factor. [9] The court should consider the employer's previous conduct and the dependability of its promises for future compliance.

COUNSEL

Claire Brady White, United States Department of Labor, Washington, D.C., for the plaintiff-appellant.

Edward N. Fadeley, Fadeley & Fadeley, Eugene, Oregon, for the defendants-appellees.

OPINION

PER CURIAM:

This is a case about willfulness, good faith and the Fair Labor Standards Act ("FLSA"). The Secretary of Labor appeals from the relief, inadequate in his view, that was granted in litigation against violators of FLSA.

The trial judge found that employers, then before the court as repeat offenders under FLSA, "knew or had reason to know that [their] employees were working overtime hours without compensation." He also ruled that the employers' acts and omissions were not "willful," and were "in good faith." He applied a two-year statute of limitation, denied liquidated damages, and refused to issue a prospective injunction. Applying controlling authority, we must reverse and remand.

I. FACTS

The dispositive facts are not contested. Appellees Frank and Joann Shirk operate the Oregon Meat Cutting School and two associated retail outlets. In an Oregon state court action in 1980, they were found guilty of violating the FLSA by failing to pay an employee time and one-half for overtime hours. After judgment was entered in that case, the Shirks installed a time clock in their Springfield work place. They told their employees that they were on "salary," but required them to punch the time clock for pay purposes. The Shirks posted, and had their employees sign, written rules emphasizing that no overtime would be authorized. Employees actually worked more than their time cards showed.[1]

[1]The district court found it difficult to credit the Shirks' assertion that they seriously intended that their employees stop working at the end of

Employees complained to the Department of Labor. Following an investigation of the Shirks' enterprise, the Secretary of Labor filed suit against the Shirks in federal district court, alleging failure to pay overtime, failure to keep and maintain proper work records in violation, and use of child labor, in violation of 29 U.S.C. §§ 207(a), 211(c) and 212(c).

The Shirks alleged as affirmative defenses: (1) they acted at all times in good faith with reasonable grounds for believing the were not violating the FLSA; (2) they were ignorant of any child labor at their enterprise; (3) they were ignorant of any overtime violations, having relied on the employees' incorrectly punched time cards; and (4) the employees' actions (including submission of time cards they knew to be incorrect and acceptance of the Shirks' no overtime policy) estopped this action under the FLSA.

The district court absolved the Shirks of the child labor charges. It found, however, that they knew or had reason to know that their employees were covered by the FLSA and were in fact working more than 40 hours per week. It concluded that the Shirks violated the overtime and reporting provisions of the FLSA, but denied the Secretary of Labor's request for three years back pay, for liquidated damages, and for injunctive relief. The Secretary of Labor appealed.

ANALYSIS

II. "WILLFUL" VIOLATION OF SECTION 255

[1] The Secretary challenges first the trial court's determination that the employees' claims were limited by a two-year

---

their shifts when important tasks (e.g., cleaning the store and packing and refrigerating perishable meat) remained to be done. Findings of fact and evidence in the record clearly indicate that despite the no overtime "rule," the Shirks expected their employees to complete the tasks assigned them even if that required that employees actually work more than forty hours per week.

statute of limitation. The Portal to Portal Act, 29 U.S.C. §§ 251 et seq., provides that:

> Any action . . . to enforce any cause of action for . . . unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act . . . may be commenced within two years after the cause of action accrued, . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . . .

29 U.S.C. § 255(a) ("section 255"). At issue here is the trial court's finding that the Shirks' acts or omissions were not "willful" for purposes of that provision.

The meaning of the term "willful" in section 255 is well settled in this Circuit. In *Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981), this court explicitly adopted:

> the following rule for determining willfulness under section 255: A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions.

See also EEOC v. First Citizens Bank of Billings, 758 F.2d 397 (9th Cir.) (applying the *Union Pacific* standard), *cert. denied*, 447 U.S. 902 (1985). We apply that standard here.[2]

We review *de novo* interpretation of the statutory authori-

[2]We recognize that other circuits have questioned that definition of willful, and that the Supreme Court will likely resolve the existing conflict among the circuits. *See Brock v. Richland Shoe*, 799 F.2d 80 (3d Cir. 1986), *cert. granted* (U.S. Oct. 5, 1987) (No. 86-1520). *First Citizens* is still the law of this circuit. It controls here.

zation of damages. *First Citizens, supra,* at 401. *See also United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.) (application of law to undisputed facts reviewed *de novo*), *cert. denied,* 469 U.S. 824 (1984). We try the matter anew, as if it had not been heard before and as if no decision had been previously rendered. *Exner v. FBI,* 612 F.2d 1202, 1209 (9th Cir. 1980).

[2] The trial court noted the applicability of *First Citizens,* but ruled that despite the Shirks' knowledge that their employees were covered by the statutory provisions, and their knowledge or reason to know that their employees were working overtime without compensastion, the Shirks did not necessarily willfully violate the FLSA. We conclude otherwise. On these facts, for purposes of Section 255, the Shirks necessarily, as a matter of law, "willfully" violated the FLSA. The three-year statute of limitation applies.

III. LIQUIDATED DAMAGES OR PREJUDGMENT INTEREST

[3] The Secretary appeals also the district court's denial of liquidated damages. Under 29 U.S.C. § 216(b), employers who violate the overtime compensation provisions of the FLSA are liable to their employees both for unpaid overtime compensation and for liquidated damages in an amount equal to the back pay liability:

> Any employer who violates the provisions of section 206 or section 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

Section 216(b) is mandatory: violators "shall be liable" for liquidated damages. *First Citizens,* 758 F.2d at 403; 29 U.S.C. § 216(b).

(A-7

[4] That section is modified, however, by section 260(b), providing that the court may, in its sound discretion, refuse to award liquidated damages if the employer demonstrates that it acted reasonably and in good faith:

> [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this Title.

Under section 260(b), the district court may deny liquidated damages

> *if, and only if,* the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not violating the Act . . . . [B]efore the district court's discretion may be invoked, the employer has the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.

Marshall v. Brunner, 668 F.2d 748, 753 (3rd Cir. 1982) (emphasis in original) (citations and footnote omitted).

The district court's determination that the Shirks satisfied their burden of demonstrating that they acted in good faith and on reasonable grounds requires the application of legal principles to established facts. We thus review the district court's determination de novo. *McConney*, 728 F.2d at 1202.

To meet their statutory burden, the Shirks were required to demonstrate both that "the act or omission giving rise to [the violation] was in good faith *and* that [they] had reasonable grounds for believing that [their] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260(b) (emphasis added). This test has both subjective and objective components.

[5] To satisfy the subjective "good faith" component, the Shirks were obligated to prove that they had "an honest intention to ascertain what [the FLSA] requires and to act in accordance with it." *First Citizens*, 758 F.2d at 403; *see also* 29 C.F.R. 790.15 (" 'Good faith' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."). It is evident from a review of the district court's findings that the Shirks failed to demonstrate their good faith in this case.

The district court found that the Shirks were repeat offenders who knew both that their employees were covered by the FLSA and that they were working overtime without compensation. These findings belie the Shirks' claim that they believed in good faith that their failure to pay overtime did not constitute a violation of the FLSA. Their awareness that their employees were working without compensation precludes a finding that they had no knowledge of circumstances which ought to have put them on inquiry. Their knowledge that their employees were covered by the FLSA demonstrates that they lacked an honest intention to find out what the FLSA requires and to act in accordance with its provisions. We are persuaded, therefore, that the district court failed to apply the correct legal standard in making its section 260(b) determination of "good faith."

To satisfy the objective component of the statutory test, the Shirks were required to prove that "[their] failure to obey the statute was . . . predicated upon such reasonable grounds that it would be unfair to impose upon [them] more than a com-

pensatory verdict." *Brunner*, 668 F.2d at 753. The district court did not indicate that it considered, much less applied, any such standard when making its section 260(b) determination.

[6] The district court found that the Shirks knew their employees were working overtime but that they "honestly believed" they could avoid liability under the FLSA by telling their employees that overtime would not be "authorized." The district court then based its denial of liquidated damages on this finding of "honest belief." Even assuming that the Shirks subjectively believed, in good faith, that they were not required to compensate their employees for "unauthorized" overtime, they failed utterly to satisfy their burden of proving that this belief was reasonable. The facts in this case simply cannot support a finding that the Shirks had objectively reasonable grounds for believing no violation was taking place.

The record before us permits only one proper conclusion: that the Shirks, as a matter of law, failed to satisfy their burden of demonstrating that they reasonably and in good faith believed that they were not violating the FLSA. Consequently, the district court had no discretion to mitigate the Shirks' statutory liability for liquidated damages. *Id.* We reverse the district court's decision on this issue and remand with instructions to award liquidated damages in accordance with the requirements of section 216(b).[3]

[3]At oral argument, both counsel queried whether the employees were entitled to liquidated damages, prejudgment interest, or both. We have determined that liquidated damages are mandated by statute. Only one such "make whole" remedy is proper here. *See Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987); *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 534 (3d Cir. 1971).

IV. PROSPECTIVE INJUNCTION

Finally, the Secretary appeals the district court's denial of injunctive relief. We review that decision for abuse of discretion or for application of an erroneous legal principle. *Brock v. Big Bear Market #3*, 825 F.2d 1381, 1383 (9th Cir. 1987).

[7] The district court based its decision to deny injunctive relief in this case largely on its finding that the defendants honestly believed they were not violating the FLSA. The court explained:

> [The Shirks'] violation of FLSA was not willful and, despite the violations, I find they were acting in good faith. I find no reason to believe they are not presently complying with the Act or that they will fail to comply with it in the future. Therefore, I do not find it necessary to issue a prospective injunction against them at this time.

Though the question of whether the trial court thereby abused its discretion is a close one, examination of our cases indicates that the district court failed to give adequate weight to relevant factors in reaching its decision.

We have emphasized that prospective injunctions under FLSA serve a remedial not a punitive purpose:

> The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway—to comply with the law. . . . [T]he manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction—*after* the court has found an unquestionable violation of the Act.

Marshall v. Chala Enterprises, Inc., 645 F.2d 799, 804 (9th Cir. 1981) (*Chala*) (emphasis in original) (quoting *Mitchell v.*

Pidcock, 299 F.2d 281, 287 (5th Cir. 1962)). We noted that "[i]n exercising its discretion, the district court must give substantial weight to the fact that the Secretary seeks to vindicate a public, not a private, right." *Id.* Prospective injunctions place the cost of noncompliance on the employer and are essential to effectuate Congress's policy of abolishing substandard labor conditions by preventing recurring violations. *Id.*; *see also Big Bear*, 825 F.2d at 1383. Thus, though the district court has discretion to deny injunctive relief in appropriate cases, this discretion is limited by consideration of the importance of prospective relief as a means of ensuring compliance with the provisions of the FLSA. *Chala*, 645 F.2d at 804.

In determining whether to award injunctive relief against an employer, the district judge should consider evidence of current compliance, any record of past violations, and the likelihood of future compliance. *See Big Bear*, 825 F.2d at 1383; *Wirtz v. Atlas Manufacturing Co.*, 377 F.2d 112 (5th Cir. 1967) (*Wirtz*). Current compliance alone is not a sufficient ground for denying injunctive relief. *Big Bear*, 825 F.2d at 1383; *Chala*, 645 F.2d at 804.

[8] The most important factor the district court must weigh in deciding whether to grant such relief is the likelihood that the employer will comply with the Act in the future. *Big Bear*, 825 F.2d at 1383 ("a district court must weigh the finding of violations against factors that indicate a reasonable likelihood that the violations will not recur"); *Wirtz*, 377 F.2d at 116.

[9] In determining likelihood of future compliance, the court should consider the employer's previous conduct and the dependability of its promises for future compliance. *Big Bear*, 825 F.2d at 1383; *Wirtz*, 377 F.2d at 116. Our review of the record convinces us that the district court did not adequately consider these factors in reaching its decision.

First, the court failed to give adequate weight to the fact that the Shirks have been guilty of violating the FLSA on at least one prior occasion by failing to pay their employees overtime compensation.[4] We stated in *Big Bear* that previous violations or bad faith are factors "weighing heavily in favor of granting a prospective injunction." 825 F.2d at 1383. The district court observed that acts of past noncompliance are "relevant" to a determination of whether injunctive relief is appropriate. It did not, however, mention the Shirks' past violation in reaching its decision.

Second, the court failed to consider adequately the dependability of the Shirks' promise of future compliance. It stated that "the extent to which the defendant has made a promise of future compliance" is a "relevant factor" in determining whether to grant injunctive relief. This misstates the relevant test. Mere assurances of future compliance do not provide a sufficient basis for denying an injunction. *Chala*, 645 F.2d at 804. Instead, the inquiry must focus on the *dependability* of the promise made. *Big Bear*, 825 F.2d at 1383; *Wirtz*, 377 F.2d at 116.

The judge's findings and other evidence in the record raise doubt as to the reliability of the Shirks' promise. They were repeat offenders of the Act. The district court found that, in the case at bar, they had violated the recordkeeping and overtime provisions of the Act. It found that the Shirks had knowledge that their employees were working overtime without compensation, but that they believed they could avoid liability for overtime under the FLSA by instructing their employees that overtime would not be authorized. Mr. Shirk testified in his deposition that he continued the practice of having employees sign a form that stated that no overtime would be authorized. Yet, the district court specifically found

[4]According to the Pretrial Order contained in the Excerpt of Record, an Oregon court entered a judgment against the Shirks in 1980 for violating the overtime provisions of the Act.

it "hard to believe" that the Shirks "seriously prefer[red]" that their employees not work overtime given the amount and nature of the work they had to do.

It thus appears from the record that the Shirks may continue the same practices that led to their liability in this case: instructing their employees not to work overtime under circumstances in which it is likely that their employees will continue to work overtime rather than leave important tasks undone. We cannot find in the district court's analysis adequate consideration of the factors weighing in favor of injunctive relief in this case. We therefore remand with instructions to reexamine this issue in light of our holdings in *Big Bear* and *Chala*.

V. CONCLUSION

We REVERSE and REMAND. The parties will bear their own costs on this appeal.

A-14

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

1/ WILLIAM BROCK, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	CIVIL No. 83-968
v.	)	
FRANK B. and JOANN SHIRK individually and doing business as OREGON MEAT CUTTING SCHOOL,	)	OPINION AND ORDER
Defendants.	)	

Plaintiff, Secretary of the Department of Labor (DOL) brought this action against Frank and Joann Shirk, owners of the Oregon Meat Cutting School.

The DOL alleges the

1/ William Brock has succeeded Raymond J. Donovan as Secretary of Labor. Pursuant to F.R.Civ.P. 25(d)(1), William Brock should be substituted, therefore, for Raymond J. Donovan as the plaintiff in this suit.

Shirks have violated the overtime record keeping the child provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 207(a), 211(c) and 212(c). The DOL seeks a restitutionary injunction against further withholding of overtime benefits due two employees based on a three year statute of limitations, liquidated damages and a prospective injunction against further violations of the FLSA.[2/]

FACTS

Frank and Joann Shirk operate the Oregon Meat Cutting School and its primary retail outlet in Cottage Grove, Oregon. Until January, 1982 the Shirks also operated a retail outlet in Springfield, Oregon. Six weeks after the Springfield store closed they opened another outlet in Eugene, Oregon.

Two full-time employees

occasionally assisted during lunch hours and vacation periods.[3/] Cheryl Ralph worked as a salesperson/supervisor at the Springfield store from December 1980 until the Springfield store closed. Thereafter she helped to prepare the Eugene store for opening and worked there from the time it opened in February, 1982 until she was laid off in December, 1982. Rita Poole worked as a salesperson at the Springfield store from approximately February, 1980 until she was laid off when the Springfield store closed.

When Ralph began working for the Shirks they each signed a document entitled "Springfield Schedule and Rules." The document specified that

> "All girls will be on Salary! You are responsible for control of your hours and we are allowing 2 girls 8 hours a day to do this job, and there is no reason it can't be done

> in that time. No time over 40 hours a week will be Authorized at any time!"

Both employees testified, however, that the job often took more than eight hours per day, particularly during the first two weeks of every month. They also testified that they were paid by the hour and were required to punch a time clock at the proper starting and ending tme regardless of when they arrived of left.[4/] Both claimed that they complied with this requirement, despite working longer hours, for fear of losing their jobs.[5/]

The parties agree that the Shirks repeatedly insisted that no overtime would be authorized at any time. Ralph and Poole both testified that Frank Shirk told them that at 6:30 p.m. (thirty minutes after closing) they were to drop whatever they were doing and leave.[6/]

The Shirks allege that they had no knowledge that any employee worked more than 40 hours per week without being compensated. According to several employees, however, including Ralph and Poole, the Shirks knew that the employees worked overtime. Ralph testified, for example, that one of her responsibilities was to call Frank Shirk nightly to report the daily accounting totals and that, particularly during the first part of each month, these calls were well after 6:30 p.m. She further testified that occasionally Frank Shirk would call her after 6:30 to question why she had not yet called. She alleged that during several of those late night calls she emphasized to Shirk the need for additional help. No additional help was provided.

Shirk also recalled an occasion when she recorded more

than 40 hours on her time card. She alleged that the card was returned to her with instructions that she change the number of hours to 40.

Another employee at the Cottage Grove store, where the Shirks also worked, testified that at the appropriate starting and ending times one employee would typically punch in all the employees' time time cards, even though the employees were usually there before the stated starting times and after the stated ending times. The same employee testified that everyone, at one time or another, questioned the Shirks about the no overtime policy and the reply was always that no overtime would be paid and they were free to quit if they wished.

In addition to her regular position with the Shirks, Cheryl Ralph entered into a separate agreement

with them for cleaning the Springfield store each Sunday. The compensation for that job was originally $5 for each of three jobs (cleaning the parking lot, meat case and freezer), or $15 total. The pay was later raised to $6 per job, or $18 total. She was paid out of the petty cash fund. Other than Ralph's notations of the expenditures on the daily account ledger, no records were kept of her hours or pay for that job.

Ralph alleges, however, that the cleaning agreement was actually for her two minor children to perform the cleaning work each Sunday under her supervision. Rita Poole's minor daughter also helped occasionally. Ralph testified that the children each signed a statement before they began working there that they would not sue the Shirks. Cheryl Ralph's daughter

testified that she signed a form but was unaware of its content. None of the children ever personally met the Shirks and there is no evidence of statements signed by the children of record.

The DOL became aware of these FLSA violations when Ralph inquired about vacation pay due her after she was laid off. Following a DOL investigation, the DOL instituted this action.

DISCUSSION

Fair Labor Standards Act Violations

The DOL initially argues that the Shirks violated § 207(a) of the FLSA by failing to pay their employees overtime compensation.

Under the FLSA an employer must pay overtime in the amount of 1½ times the regular pay rate of pay when he "suffers" or "permits"

employees to work more than 40 hours per week. 20 U.S.C. § 207(a). "Suffer" or "permit" has been interpreted to mean "with the knowledge of the employer." Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984), citing Fox v. Summit King Mines, 143 F.2d 92, 93 (9th Cir. 1944). This interpretation was expanded on in Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413 (9th Cir. 1981) as follows:

> An employee who knows or should have known that an employee is or was working overtime must comply with the provisions of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation.

Id. at 414.

The Shirks instructed their employees that no overtime was authorized and testified that they were unaware that their employees actually worked uncompensated overtime.

The employees themselves acknowledged that, after they were specifically instructed not to, they did not record any overtime hours they worked.

The Shirks contend that, even if the employees did work more than 40 hours per week, the employees are estopped from asserting that against the Shirks because they did not record the overtime on their time sheets.

It is true that where an employee's actions prevent an employer from knowing of the alleged uncompensated overtime hours the employer had not violated § 207 by suffering or permitting the overtime. Forrester v. Roth's I.G.A., 646 F.2d at 414. If, in fact, the Shirks' employees were deliberately concealing their overtime hours and the Shirks had no reason to know that they were being worked, the Shirks would no be

liable under § 207. The facts here, however, do not support such a conclusion.

For example, Ralph's testimony that she often called Frank Shirk with the store's accounting totals after 6:30 (or that he called her after 6:30) evidence his knowledge of the overtime hours. The Shirks' knowledge is also evidenced by Ralph's testimony regarding her time card being returned to her because it reflected more than 40 hours. Additionally, the Cottage Grove employees' questioning of the Shirks regarding the overtime policy and their presence before and after their shifts gave the Shirks notice of the overtime hours worked.

These incidents were sufficient to put the Shirks on at least inquiry notice that their employees were working overtime.

Therefore, the employees are not estopped from asserting their right to overtime pay despite their failure to record the totals.

Either to counter the allegation that the Shirks knew that their employees were working overtime, or to resist liability despite that knowledge, the Shirks rely on their written rules, signed by the employees, which specified that no overtime would be authorized.

However, "liability under the Act depends not upon formal or agreed arrangements between the employer and the employee limiting work hours but upon the number of hours the employee is actually permitted to work for the employer's benefit." Mumbower v. Callicot, 526 F.2d 1183 (10th Cir. 1983). Further, as explained in the regulations pursuant to § 207,

if the Shirks did not wnat any of their employees to work any overtime, they had a position duty to enforce that rule:

> § 785.13 Duty of Management
> In all such cases it is the duty of the management to exercise its control and see that the work is not performed it it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R § 785.13

A statement in the Shirks' internal regulations was insufficient to insulate the Shirks from liability for overtime compensation.

From the testimony of both Springfield store employees, it appears that, particularly during the first two weeks of every month, they were unable to perform their required duties within 40 hours. There is also

substantial evidence that the Shirks knew that their employees were working more than 40 hours per week. There is also substantial evidence that the Shirks knew that their employees were working more than 40 hours per week. Therefore, I find that the Shirks have violated § 207 of the FLSA.

The DOL next argues that the Shirks violated the child labor provision of the FLSA, § 212(c), by permitting Ralph's and Poole's to perform cleaning work under Ralph's supervision at the Springfield store on Sundays. The Shirks maintain that the weekend working agreement was made strictly with Cheryl Ralph and that they had no knowledge that minor children were actually performing work.

The DOL contends that the fact that this work was compensated from the petty cash fund indicates

that the Shirks knew that minors were working under Ralph. It also relies on Cheryl Ralph's testimony that the children signed forms promising not to sue the Shirks. One child testified that she signed a form but was unaware of its content. There is no form signed by any of the children in evidence and none of the children ever personally met the Shirks. Ralph also claimed that, knowing her children were working under her, based on her age the Shirks must have known that the children were minors.

These unsubstantiated allegations and circumstatial justifications are not sufficient evidence on which to base a conclusion that the Shirks knowingly permitted minor children to work at the store in violation of § 212(c). I am compelled to believe that the Shirks

were actually unaware, albeit perhaps negligently, that minors were performing the cleaning work at the Springfield store.

This conclusion, however, does not leave the Shirks without fault with respect to this cleaning work. If the Shirks actually believed they were paying Ralph to perform the cleaning work, they have violated § 211(c) by failing to maintain proper records. they have also further violated § 207 by failing to include this amount in Ralph's earnings for purposed of calculating overtime due her.

With regard to the additional overtime violation, Frank Shirk testified in his depostion that the amount paid to Ralph from the petty cash fund was actually 1½ time. The Shirk's attorney noted later that "there

is no contradiction of it and there is no rebuttal testimony."

The agreement with Ralph relative to this cleaning does not specify that the amount she was to be paid represented 1½ time, and that is no indication anywhere in the record that Shirk informed Ralph that the amount she was to be paid for cleaning represented 1½ times her regular pay rate. Such an agreement between employer and employee is essential in order to comply the overtime provisions of the Act. See Brennan v. Valley Towing, 515 F.2nd 100 (9th Cir. 1974), citing Hodgson v. Penn Packing, 335 F. Supp. 1015 (E.D. Penn. 1971).

Absent a prior agreement, regardless of whether Shirk's testimony regarding his calculation of her pay is unmet of unrebutted, it is not

valid. "It is the 'actual fact' of a stepped-up rate for overtime which propagates the goals of the Act, and not the hypothetical retrospective construction of such a rate structure." Valley Towing, 515 F.2d at 106.

Therefore, assuming the after hours cleaning agreement was solely between the Shirks and Ralph, the Shirks violated § 297 relative to this agreement.

The Shirks also violated §211(c), the record keeping provision, relative to this agreement. Section 211(c) explicitly requires employers to keep detailed payroll and other employment records for all employees. Ralph was paid for her after hours cleaning work out of the petty cash fund. Other than Ralph's own notations on the petty cash ledger sheet of the payments made for the cleaning, no

records were kept regarding these payment. This failure on the Shirks' part is a clear violation of § 211(c).

Damages

The DOL seeks a restitutionary injunction for the amount of back overtime pay due Ralph and Poole in the amount of $13,415 for Ralph and $1,370 for Poole. These calculations are based on a three year statute of limitations. It also seeks liquidated damages in addition to the actual overtime pay due and a prospective injunction against further violations of the Act.

Statute of Limitations

The FLSA Carries with it a two year statute of limitations unless the violation is "willful", in which case the statute is extended to three years. 29 U.S.C. § 255. The DOL contends that the Shirks' violations

of FLSA were willful and therefore argue that a three year statute of limitations is appropriate in this case.

In Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, (9th cir 1985), The Ninth Circuit enunciated a rule to determine willfulness for statute of limitations purposes. It provides that "[a] violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provision." Id. at 1091.[7/]

The Shirks knew their employees were covered by the FLSA.[8/] They also know or had reason to know that their employees were working overtime hours without compensation. These facts, however, do not necessarily

indicate that they were willfully violating the Act.

All of the employees knew that the Shirks would not authorize any overtime work. Ralph and Poole signed statements when they began working for the Shirks that emphatically stated that no overtime would be authorized. Additionally the Shirks specifically told the employees not to work beyond their regular shifts. These directions do not insulate the Shirks from liability for violating § 207 (and, in fact, it was to the Shirks' benefit that the employees did not follow their directions.) Nonetheless, I am convinced that the violations were not willful. The Shirks instituted a policy of no overtime and reinforced it both orally and in statements signed by the employees. I am convinced that they reasonably

through their obligations under the Act were satisfied by their practice of enforcing their policy. Accordingly, I find that the two year statute of limitations applies in this case.

Liquidation Damages

The FLSA requires that "[a]ny employer who violates the provisions of Section 206 or 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid wages . . . and an additional amount as liquidated damages." 29 U.S.C §261(b).

Liquidated damages are mandatory unless the employer proved his good faith and are intended to "compensate employees for losses they might suffer by reason of not receiving their lawful wages." E.E.O.C. v. First Citizens BAnk of Billings, 758 F.2d 397, 403 (9th Cir. 1985).

The good faith exception provides that

> If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the (FLSA) . . . the court may, in its sound discretion award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 261 of this title.

29 U.S.C § 260.

The employer's good faith depends on "whether the employer, in acting or omitting to act as he did, and in relying upon the regulation . . . acted as a reasonable prudent man would have acted under similar circumstances. "Good faith" requires that the employer have honesty on intention and no knowledge of circumstance which ought to put him on inquiry." 29 C.F.R. § 790.15.

For the same reasons

I found the Shirks' violations not wilful, I also find that they were acting with good faith belief that they were complying with the FLSA. I am convinced that the Shirks honestly believed that by adopting and reinforcing their no overtime policy, they were satisfying their obligations under the Act. Therefore, I find that the employees are not entitled to liquidated damages.

Damage Calculations

The DOL seeks damages of $1,370 for Rita Poole and $13,415 for Cheryl Ralph. These figures do not represent the exact number of overtime hours worked by either employee, but rather were calculated from estimates prepared by DOL.

The employees's failure to specify the exact number of hours worked and amounts due, however, does

not preclude them from recovering amounts due them. It is the employer's responsibility to maintain proper records of hours worked by employees. The employers failure to properly maintain records does not prevent the employees' recovery. Rather,

> The solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benfits of an employee's labors without paying due compensation as contemplated by the Friar Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The

> burden then shifts to the employer to come forward with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even thought the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946); Wirtz v. Dix Box Co., 322 F.2d 499 (9th Cir. 1963).

The employees have shown that they were improperly compensated and have produced estimates of their overtime hours through calculations prepared by the DOL. These calculations are adequate to provide approximations of the hours worked. See Wirtz v. Dix Box Co., 322 F.2d at 500-01.

The DOL seek $1,370 on behalf of Rita Poole. This amount is calculated based on a three year statute of limitations. Applying the

two year statute, the total amount due Poole is approximately $650. The DOL's estimate of overtime hours Poole worked appears to be substantiated in the record. Accordingly, I find her entitled to back overtime wages of $650.

The DOL seeks $13,415 on behalf of Cheryl Ralph , again based on a three year statute of limitations. Applying a two year statute of limitations, her estimates would be approximately $7,200. Some of the hours estimated, however, are not adequately substantiated in the record. For example, the computation sheet estimate lists a five week period during which she claims to have worked 32 overtime hours each week. While the record does reflect that she worked a substantial number of overtime hours, it does not reflect a five week period

of 52 hour weeks. A more accurate estimate of Cheryl Ralph's overtime hours would entitle her to approximately $4,000. I therefore find her entitled to that amount.

Prospective Injunction

Whether an injunction should issue against a defendant is addressed to the sound discretion of the trial judge. To determine whether to issue an injunction, some relevant factors include; 1) the employer's previous actions of noncompliance or litigation; 2) the extent to which the defendant has made a promise of future compliance. See Marshal v. Chala Enterprises, Inc., 645 F.2d 799 (9th Cir. 1981); Wirtz v. Atlas Roofing Manufacturing Co., 377 F.2d 112 (9th Cir. 1967).

The Shirks' violation of the FLSA was not willful and, despite

the violations, I find they were acting in good faith. I find no reason to believe that they are not presenting complying with the Act or that they will fail to comply with it in the future. Therefore, I do not find it necessary to issue a prospective injunction against them at this time.

CONCLUSION

Defendants Frank and Joann Shirk have violated §§ 207 and 211(c) of the FLSA by failing to pay overtime compensation due their employees and by failing to maintain proper employment records on behalf of their employees. They have not, however, violate the child labor provisions of the FLSA, § 212(c).

The Shirks' former employees Cheryl Ralph and Rita Poole are entitled to back overtime wages due the of $4,000 and $650 respectively.

These damages are based on a two year statute of limitations. The employees are not, however, entitled to liquidated damages.

I further find it unnecessary to impose on the Shirks a prospective injunction for future violations at this time.

IT SO ORDERED.

DATED this _____ of May 1986.

/s/ James M. Burns
United States District Judge

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FOOTNOTES

1/ The complaint alleges damages on behalf of a third employee who was employed at the Shirks' Cottage Grove store. However, after the complaint was filed that employee was paid back amounts due him and no evidence was introduced at trial relative to his claim against the Shirks.

2/ In defendants' pretrial brief they asserted that a "part time worker was provided and other worker assistance was available." There is no evidence in the record to indicate that additional help was ever provided or that the part time worker assisted at times other than vacation or lunch periods of the regular employees.

3/ Neither party suggests that the employees may have arrived later than or left earlier than their scheduled shifts.

4/ During the trial Rita Poole testified that she stopped punching in the extra hours she worked approximately one month after she started working there after Frank Shirk told her that her work was to be completed within eight hours or she would be replaced.

5/ From this testimony it appears that the Shirks would prefer to allow their store to go uncleaned and their perishables uncared for than to pay their employees to perform the work. I find it hard to believe that owners/operators of a meat cutting school could seriously prefer that

their meat be left to spoil than to pay their employees to properly care for it before leaving for the night.

6/ This rule was derived from the approaches taken by the Fifth and D.C. Circuits. The D.C. Circuit test states that "[t]he employer's noncompliance is "willful" when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resove the doubt." Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461-62 (D.C. Cir. 1979). Under the Fifth Circuit test the employer's actions are willful "if he knows or has reason to know, that his conduct is governed by the Fair labor Standards Act." Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974), citing Coleman v. Jiffy June Farms, Inc., 485 F.2d 1139 (5th Cir. 1972). The Fifth Circuit added that the employer's ignorance of his obligations does not insulate him from liability in noting that "an ostrich-like cultivation of ignorance has never violation of the Act." Id.

7/ The defendants were involved in state court litigation regarding overtime pay requirements under the Act in 1980. They do not now contest that their employees are covered by the Act.

8/ The foregoing findings of fact and conclusions of law are entered pursuant to Rule 52 of the Federal Rules of Civil Procedure.

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U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
AND ENTERED
MAY 29, 1986

ROBERT M. CHEIST CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILLIAM E. BROCK, SECRETARY LABOR, UNITED STATES DAPARTMENT OF LABOR, Plaintiff, v. FRANK B. and JOANN SHIRK individually, and doing business as OREGON MEAT CUTTING SCHOOL, Defendants.	CIVIL ACTION File No. 83-968 JUDGEMENT

This matter having come before the court for trial on October 16 and 17, 1984, and the Court being fully apprised of the facts therein, based upon the entire record including the Opinion and Order previously entered by the Court and for cause shown, it is:

ORDERED, ADJUDGED AND DECREED that defedants, Frank B. and Joann Shirk, d.b.a. Oregon Meat Cutting School, will deliver, within thirty days of the entry of the Judgment, a check in the gross amount of four thousand dollars ($4,000.00) to Cheryl Ralph, and a check in the gross amount of six hundred and fifty dollars ($650.00) to Rita Poole, both checks made payable in the net amount after appropriate deductions for social security and withholding.

IT IS FURTHER ORDERED

that no costs be allowed.

DATED May 29, 1986.

/s/ James M Burns
JAMES M. BURNS
United States District Judge

Presented by:

/s/ Faye von Wrangel
Faye von Wrangel
U.S. DEPARTMENT OF LABOR
Attorney for Plaintiff
Dated May 22, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. Box 547
San Francisco, California 94104

OFFICE OF THE CLERK
U.S. DISTRICT COURT
102 U.S. COURTHOUSE
211 EAST SEVENTH AVENUE
EUGENE, OR 97401

C.A. NO.	D.C. NO.	Title
86-4121	CV-83-986-E	BROCK VS. SHIRK

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[ ] Certified copy of the Court
[ ] Judgement of the national Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of the letter.

Very truly yours
Clerk of Court
/s/ Sylvia McCluster
Deputy Clerk

Enclosure(s)
CC: ALL COUNSEL (WITHOUT ENCLOSURE)

CA9-045 (10/15/79)

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtim compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A § 276a et seq.]

(a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947-may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

(May 14, 1947, c. 52, § 11,61 Stat. 89; Apr. 8, 1974, Pub.L 93-259, § 6(d)(2)(B), 88 Stat. 62.)

I, Edward N. Fadeley, attorney for Frank and Joann Shirk, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 26th of April, 1988, I served a copy of the attached Petition for Certiorari on:

William Brock,
Secretary of Labor,
& his attorney of Record,
Claire Brady White, Esq.
U.S. Department of Labor, Office of the Solicitor,
200 Constitution Ave. NW,
Room N2716,
Washington D.C. 20210, and

Solicitor General,
Department of Justice,
Washington D.C. 20530,
Attorneys for Respondent.

Two Copies Served

Dated April 26, 1988.

Edward N. Fadeley
Attorney for Petitioners
OSB No. 57027
777 High Street, #350
Eugene, OR 97401

of the court and none has called for a vote on that suggestion. En banc review is denied.

The court notes with disapproval the intemperate and unprofessional language of the petition. While some tolerance is permitted for misspelled words, there is no excuse for insulting language in papers filed by counsel with this court.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK B. AND JOANN SHIRK, INDIVIDUALLY AND DOING BUSINESS AS OREGON MEAT CUTTING SCHOOL, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that their violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. IV) 201 *et seq.*, were willful and that they were liable for liquidated damages. Their primary argument is that the court of appeals failed to give sufficient deference to the district court's findings of fact.

1. Petitioners Frank B. and Joann Shirk own and operate the Oregon Meat Cutting School and its associated retail outlets (Pet. App. A3). In 1980, an Oregon state court found that petitioners had violated the FLSA by failing to pay overtime compensation to an employee (*ibid.*). Thereafter, petitioners posted and required their employees to sign written rules specifying that " '[a]ll girls will

be on Salary,' " and "[n]o time over 40 hours a week will be Authorized [*sic*] at any time' " (*id.* at A3, A16-A17). Petitioners admonished their employees that overtime was not authorized and required them to punch time cards reflecting 40-hour work weeks, regardless of the number of hours actually worked (*id.* at A3, A17, A19, A23, A24).

Despite this overtime policy, during most of the period from December 1980 through December 1982, two of petitioners' retail outlet employees regularly worked more than 40 hours per week, remaining after closing hours to clean the outlets, store perishables, and report daily accounting totals to petitioners (Pet. App. A16, A18, A45 n.5). Petitioners knew these employees were working overtime, but failed to pay them overtime compensation (*id.* at A24, A27). In addition, petitioners entered into a separate agreement with one of these employees to pay her from petty cash funds to clean the retail outlet on Sundays (*id.* at A19-A20). This work was performed outside of normal work hours, generally by the employee's minor children, and petitioners kept no record of the hours worked or payments made (*id.* at A20).

In 1983, the Secretary of Labor filed suit in district court to enjoin, and to recover back pay for, petitioners' violations of the overtime, child labor, and recordkeeping provisions of the FLSA (Pet. App. 15). As to the overtime claim, the district court found that "particularly during the first two weeks of every month, [the employees] were unable to perform their required duties within 40 hours," and that there was "substantial evidence that the [petitioners] knew that their employees were working more than 40 hours per week" (*id.* at A26-A27). Thus, the court held, petitioners' failure to pay overtime compensation to these employees violated Section 207 of the FLSA (*id.* at A27).[1]

[1] With respect to the weekend cleaning agreement, the district court held that petitioners had not knowingly violated the FLSA's child

Turning to the Secretary's claim for back wages, the court declined to apply the three-year statute of limitations applicable to willful violations under 29 U.S.C. 255(a). The court recognized that under governing Ninth Circuit precedent, violations were willful " 'when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provision' " (Pet. App. A33, quoting *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981)). The court found that petitioners knew their employees "were covered by the FLSA," and "were working overtime hours without compensation" (Pet. App. A33). Nonetheless, the court concluded that petitioners reasonably believed their no-overtime policy satisfied their obligations under the Act. The court held, therefore, that their violations were not willful (*id.* at A34-A35). Thus, the court applied the two-year statute of limitations for back pay. The court also declined to award liquidated damages (an additional amount equal to the back wages) under 29 U.S.C. 216(b). The court reasoned that petitioners had established the good faith required by 29 U.S.C. 260 to avoid liquidated damages because petitioners honestly believed that implementation of their no-overtime policy brought them into compliance with the Act (*id.* at A36-A37).[2] For the same reason, the court refused to issue a prospective injunction (*id.* at A41-A42).

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labor provisions (Pet. App. A28-A29), but that the arrangement violated the Act's recordkeeping and overtime provisions (*id.* at A29, A31).

[2] The district court's application of the two-year statute of limitations and its refusal to order liquidated damages reduced the amounts sought on behalf of the two employees from $1,370 and $13,415 to $650 and $7,200, respectively (Pet. App. A39-A41). The court awarded the $650 requested for one employee but further reduced the $7,200 requested for the other employee to an award of $4,000 based on its rejection of the Secretary's computation of overtime hours.

The court of appeals reversed the district court's rulings regarding willfulness, liquidated damages, and a prospective injunction. Reviewing de novo the district court's application of the *Union Pacific* willfulness standard to the undisputed facts (Pet. App. A5-A6), the court held that petitioners "necessarily, as a matter of law, 'willfully' violated the FLSA," since they knew their employees were covered by the Act and were working overtime without compensation (*id.* at A6). Accordingly, the three-year statute of limitations applied (*ibid.*).

The court of appeals also disagreed with the district court's analysis of the liquidated damages issue. The court noted that under the applicable legal standard, the district court has discretion to reduce the amount of liquidated damages under 29 U.S.C. 260 only when an employer carries " 'the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.' " (Pet. App. A7, quoting *Marshall* v. *Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)). The court reviewed de novo the application of this legal standard to the facts found by the district court. First, the court concluded that petitioners did not satisfy the subjective "good faith" component of the test because their awareness of the Act's coverage and of their employees' overtime work demonstrated that they lacked an honest intention to ascertain what the FLSA requires and to act accordingly (Pet. App. A8). Second, even assuming petitioners subjectively believed they were acting in accordance with the FLSA, they failed to establish "reasonable grounds" for their belief. The court noted that the trial court had neither considered nor applied the objective aspect of the legal test (*id.* at A9). Applying the legal test itself, the court of appeals held that the "facts in this case

simply cannot support a finding that [petitioners] had objectively reasonable grounds for believing no violation was taking place" (*ibid.*). Accordingly, the court of appeals ruled that petitioners had not carried their burden under 29 U.S.C. 260, and the district court, therefore, had no discretion to mitigate petitioners' liability for liquidated damages.[3]

2. The court of appeals' construction of the willfulness standard under the statute of limitations provision of 29 U.S.C. 255(a) is incorrect in light of this Court's decision in *McLaughlin* v. *Richland Shoe Co.*, No. 86-1520 (May 16, 1988). In that case, the Court held that the willfulness standard that triggers the three-year statute of limitations under Section 255(a) requires that the employer knew or showed reckless disregard as to whether his conduct was prohibited by the FLSA. Slip op. 5. Since the court of appeals applied a distinctly different standard, less favorable to the employer, were the issue raised in the petition, it would be proper to grant, vacate, and remand for reconsideration of the willfulness issue in light of *Richland Shoe*.

We do not, however, read the petition, in either its statement of questions presented or elsewhere, as calling into

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[3] The court remanded for further consideration of injunctive relief, as it questioned petitioners' future compliance in light of their past violations and their continued practice of having employees sign forms that no overtime was authorized, although overtime would likely be required to do their jobs (Pet. App. A12-A13). Petitioners have not challenged this aspect of the court's opinion in the petition.

[4] The petition's first four "Questions Presented" focus on whether a court of appeals can reverse a district court on the factual issue of intention; the fifth question raises the issue whether a court of appeals can ignore a statutory defense of good faith and willfulness "without explaining, in its per curiam opinion, why these provisions of [the] statute should be nullified in this case" (Pet. 6).

issue the court of appeals' construction of the standard of willfulness under Section 255(a).[4] Under Rule 21 of the Rules of the Supreme Court, "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

In other respects, including the issues explicitly raised in the petition, the court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

Petitioners' principal argument is that the court of appeals erred in reviewing de novo the district court's conclusions regarding willfulness and liquidated damages, rather than using a clearly erroneous standard (Pet. 15-17).[5] The sole authority upon which petitioners rely is this Court's decision in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986). In *Icicle*, the Court held that the court of appeals should not have made factual findings on its own before determining whether certain employees were seamen excluded from the FLSA, but should have remanded to the district court to make those factual findings (475 U.S.

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[5] Petitioners also challenge the adequacy of the record upon which the court of appeals based its judgment (Pet. 9-14). Petitioners' objection is meritless. First, to the extent that petitioners believed the record before the court of appeals was incomplete, they had both an opportunity and an obligation under Rules 10(b)(3) and 30(b) of the Federal Rules of Appellate Procedure to designate for inclusion in the appendix the additional record excerpts they considered necessary. Second, the specific omissions which petitioners identify—a videotape, long distance phone bills and a computerized summary of work hours (Pet. 10, 11, 13)—relate to whether petitioners' employees had, in fact, worked overtime without receiving compensation; the district court resolved this issue adversely to petitioners, and they did not challenge that finding on appeal. The omitted exhibits have nothing to do with the analysis applied by either the district court or the court of appeals to the questions of willfulness and mitigation of liquidated damages.

at 713-714). *Icicle* endorsed, however, the very different standard of review applied by the court of appeals in this case: the *Icicle* Court reaffirmed that a court of appeals can review the application of law to unquestioned findings of fact on a de novo standard. See *id.* at 714 ("If [the court of appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could * * * reverse[ ] the District Court's judgment.").

In this case, the court of appeals did not commit the *Icicle* error of usurping the district court's authority to find facts. Rather, relying on the district court's findings, the court of appeals concluded that reversal of the district court's judgment was necessary because although the "factual findings were unassailable, * * * the proper rule of law [had been] misapplied to those findings" (*Icicle,* 475 U.S. at 714). On the willfulness issue, the district court found that petitioners knew both that their employees were covered by the FLSA and that they were working overtime without proper compensation. The court of appeals applied the law to those findings to conclude that petitioners' violations were willful under the then-applicable "appreciable possibility" standard (Pet. App. A5-A6). Similarly, on the liquidated damages issue, the district court's factual findings were accepted by the court of appeals in determining whether petitioners had carried their burden under 29 U.S.C. 260 (*id.* at A8-A9). The court of appeals was persuaded, however, that the district court failed to apply the correct legal standard to the subjective good faith component of the test and failed to consider the objective component of the test. The court then proceeded to apply the legal test to the district court's facts de novo, and reversed the district court on that basis (*id.* at A9). Thus, the standard of review used by the court of appeals was fully consistent with *Icicle.*

It is therefore respectfully submitted that the petition for certiorari should be denied, or, in the alternative, the Court should grant, vacate, and remand in light of *Richland Shoe.*

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